APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED APRIL 16, 2004, in Van Tu v. Maj. Gen. Koster, et al., Case No. 02-4209

FILED United States Court
of Appeals Tenth Circuit
APR 16 2004
PATRICK FISHER Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HOANG VAN TU; NGUYEN THI KHUONG; NGUYEN DINH; TRAN NAM; TRUONG TRAIN; PHAM DAT; PHAM THI THUAN, individually and as representatives of the class of victims of the My Lai Massacre,

No. 02-4209

Plaintiffs-Appellants,

v.

MAJOR GENERAL KOSTER; LT. COL. HOLLADY; COL. YOUNG; CPT. RIGGS; CPT. MICHLES; CPT. ERNEST L. MEDINA; LT. WILLIAM RUSTY CALLEY; PT. MICHAEL TERRY; UNITED STATES OF AMERICA,

Defendants -Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 2:00-CV-807-DB)

Submitted on the briefs:

S. Austin Johnson of Johnson Law Firm, P.C., Orem, Utah, for Plaintiffs-Appellants.
Drew Briney, Spanish Fork, Utah, for Defendant-Appellee Michael Brent Terry.

Paul M. Warner, United States Attorney, District of Utah; Barbara Biddle, Assistant Director, Appellate Staff Civil Division, U.S. Department of Justice; Robert M. Loeb, Special Appellate Counsel, Appellate Staff Civil Division, U.S. Department of Justice; Jeremy S. Brumbelow, Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for DefendantsAppellees Ernest L. Medina and the United States of America.

Before BRISCOE and McKAY, Circuit Judges, and BRORBY, Senior Circuit Judge.

BRISCOE, Circuit Judge.

Plaintiffs appeal from the district court's order dismissing their complaint on statute-of-limitations grounds. We affirm.(1)

FACTS

Plaintiffs are residents of the Village of Son My, Quang Ngai Province, in the Republic of Vietnam. They bring this action on their behalf and as representatives of deceased victims and survivors of the My Lai Massacre. The My Lai Massacre occurred on March 16, 1968, during

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(1) After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

the Vietnam War, when members of the United States military allegedly committed atrocities, including murder, against civilian residents of the village of Son My (My Lai).

Plaintiffs filed this suit over thirty-two years after the fact, on October 12, 2000. They named a Utah defendant, Private Michael B. Terry, and several other American soldiers who allegedly committed violations of the Law of War. On September 23, 2002, the district court entered an order dismissing the entire action, with prejudice, on statute-of-limitations grounds.

ANALYSIS

Plaintiffs' complaint advances claims under 42 U.S.C. § 1983, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Alien Tort Statute, 28 U.S.C. § 1350. The district court concluded that plaintiffs had no cause of action under *Bivens* or § 1983. It further concluded that Utah's four year statute of limitations for personal injury claims barred plaintiffs' § 1983 claims. Finally, it concluded their § 1350 claims were time-barred because they were not brought within ten years. We review the district court's application of the statute of limitations *de novo*. United *States v. Hurst*, 322 F.3d 1256, 1259 (10th Cir. 2003).

1. Section 1983/*Bivens* claims

Plaintiffs' complaint does not state a claim under § 1983 because the activities of the United States military were not taken under the color of state law. *See Dry v. United States*, 235 F.3d 1249, 1255-56 (10th Cir. 2000). Plaintiffs

appear to concede this deficiency. On appeal, they argue that their action actually was brought under *Bivens*. See Aplt. Opening Br., No. 02-4209, at 5-6.

The availability of a *Bivens* remedy is also questionable. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (1985) ("[T]he special needs of foreign affairs must stay our hand in the creation of damage remedies [under *Bivens*] against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."). We need not decide whether *Bivens* applies, however, because plaintiffs' *Bivens* claim is, in any event, barred by the statute of limitations.

Bivens is a judicially created remedy that does not have its own statute of limitations. *Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994). *Bivens* actions generally borrow the general personal injury limitations statute in the state where the action arose. *Id.*

Cognizant of this rule, plaintiffs assert that their action "arose" in Vietnam, rather than in Utah. Vietnam is not, of course, a state of the Union; it is a foreign state. Plaintiffs cite no authority to support their claim that the law of a foreign state may be borrowed to create a Bivens statute of limitations. They also present no argument favoring Vietnamese law under choice of law principles, beyond a bare assertion that the action "arose" in Vietnam.
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Plaintiffs argue that Vietnam's Communist government has established no statute of limitations for personal injury because it does not recognize the right of citizens to bring tort suits. Given this void in Vietnamese law, we are not asked to choose between two conflicting state limitations statutes, *see id.* at 968 n.4; instead, we are asked to disregard the law of the forum state, Utah, in favor of a non-existent, and therefore hypothetically unlimited, foreign statute of limitations. Plaintiffs give us no reason to do so.

Plaintiffs also argue since Vietnam is a signatory to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,* adopted by the United Nations General Assembly on November 26, 1968,(2) and since Article 1 of this Convention makes limitations statutes inapplicable to "war crimes" or "crimes against humanity," we should apply the treaty and hold that there is no statute of limitations. The United States is not a signatory to this Convention. Plaintiffs present no authority for applying an unlimited statute of limitations contained in a treaty ratified by a foreign: state, but not the United States, to a *Bivens* claim. If this were not enough reason to reject plaintiffs' argument, we note also that the Convention refers exclusively to prosecution for crimes, not to tort liability.

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(2) The convention may be found at htlp://www.unhchr.ch/htmi/menu3/b/12 limit.htm (visited March 4, 2004).

Plaintiffs chose Utah as the forum state in which to bring this action. Utah provides a four-year residual statute of limitations for personal injury actions, which we will apply to plaintiffs' *Bivens* claims. Utah Stat. Ann. § 78-12-25(3). *Cf. Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir. 1995);(applying § 78-12-25(3) to § 1983 action).

Although state law establishes the statute of limitations, federal law determines when plaintiffs' federal *Bivens* claims accrued. *Industrial Constructors*, 15 F.3d at 969. Under federal law, the statute of limitations on a *Bivens* claim "begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." Id. We agree with the district court that plaintiffs had reason to know of the existence and cause of their injuries when they occurred, on March 16, 1968, and therefore, absent tolling, which we address later in this opinion, they should have filed their suit no later than March 16, 1972. The district court therefore correctly determined that plaintiffs' *Bivens* claims were untimely.

2. Claims under Alien Tort Statute

The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Statute itself provides no time bar for such actions. Although we

have not previously decided what statute of limitations applies to an action under the Statute, most other courts considering the issue have borrowed the ten-year statute of limitations contained in the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 *note*, § 2(c) (TVPA), as the most analogous federal statute of limitations. *See, e.g., Deutsch v. Turner Corp.*, 324 F.3d 692, 717 & n.18-09th Cir.), *cert. denied*, 124 S. Ct. 105, 132, 133 (2003); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 118-19 (D.D.C. 2003).

Plaintiffs argue that it is inappropriate to borrow the statute of limitations associated with the TVPA, because they have not filed their action as torture victims. Beyond this general observation, they provide no discussion of the governing principle, the "most closely analogous statute of limitations rule." *See Deutsch*, 324 F.3d at 717 n.18. Once again, they merely assert that Vietnamese law, which contains no statute of limitations, is more appropriate because the tort occurred in Vietnam. We conclude that the TVPA is more closely analogous to the Alien Tort Statute action than the law of Vietnam. The district court properly determined that plaintiffs were required to bring their action within the ten-year statute of limitations, and that they failed to do so.
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3. Equitable tolling

Plaintiffs argue that the aforementioned statutes of limitations should be tolled because of exceptional circumstances. We agree with the district court that even if some degree of equitable tolling were appropriate on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel, plaintiffs have made no showing sufficient to justify tolling the *Bivens* claim for twenty-eight years, and their Alien Tort Statute claim for twenty-two. We therefore reject their equitable tolling argument.

4. Application to Calley

Finally, plaintiffs argue that the district court should not have dismissed defendant Calley on statute-of-limitations grounds, because he waived the defense by failing to raise it in his motion to dismiss. Calley filed a pro se motion to dismiss, which the district court denied. He then filed an answer to the complaint, in which he asserted several affirmative defenses, including the statute of limitations.

Plaintiffs' waiver argument is rneritless. Rule 8(c) of the Federal Rules of Civil Procedure requires a party to include the defense of statute of limitations in his responsive pleading. Calley properly raised the defense in his answer. It is therefore irrelevant that he did not present it in his motion to dismiss. *See, e.g.,*
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Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002), cert. denied, 124 S. Ct. 48 (2003); *Expertise, Inc. v. Aetna Fin. Co.*, 810 F.2d 968, 973 (10th Cir. 1987). Further, although Calley did not join in Terry's motion to dismiss, the district court could *sua sponte* grant dismissal on the pleadings for Calley, particularly when another motion to dismiss on the same basis was already pending. See 2 James William Moore, *Moore's Federal Practice* § 12.38 & n.3 (3d ed. 2003) ("Any party may move for judgment on the pleadings, or the court may act *sua sponte*.").

The district court properly dismissed plaintiffs' complaint against all defendants as untimely. The judgment of the district court is AFFIRMED.
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APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED APRIL 16, 2004, in Van Tu v. Maj. Gen. Koster, et al., Case No. 03-4041.

FILED
United States Court of Appeals
Tenth Circuit

APR 16 2004

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HOANG VAN TU; NGUYEN THI KHUONG; NGUYEN DINH; TRAN NAM; TRUONG THAIN; PHAM DAT; PHAM THI THUAN, individually and as representatives of the class of victims of the My- Lai Massacre, Plaintiffs-Appellants, MAJOR GENERAL KOSTER; LT. COL. HOLLADY; COL. YOUNG; CPT. RIGGS; CPT. MICHLES; LT. WILLIAM RUSTY GALLEY; UNITED STATES OF AMERICA, Defendants, PT. MICHAEL TERRY, Defendant-Appellee.	No. 03-4041 (D.C. No. 2:00-CV-807-DB) (D. Utah)

ORDER AND JUDGMENT*

Before BRISCOE and McKAY, Circuit Judges, and BRORBY, Senior Circuit Judge.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata,

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

Plaintiffs appeal from the district court's order awarding attorney's fees and costs in favor of defendant Michael B. Terry. We affirm.

FACTS

The parties are familiar with the facts, and we will summarize them only briefly. On October 3, 2002, Terry moved for an award of attorney's fees and costs. The district court heard arguments on the attorney-fee issue. Finding that plaintiffs had acted in bad faith in their interactions with Terry, it entered an order awarding attorney's fees and costs to Terry in the amount of $12,055.50, from which the plaintiffs filed an amended notice of appeal.

Although Terry had requested that the district court award fees and costs against both plaintiffs and their attorneys, S. Austin Johnson and Johnson Law Firm P.C. (hereafter referred to collectively as "Johnson"), the and district court's order did not specify whether it was plaintiffs or Johnson who are responsible for the attorney's fees and costs. In any event, Johnson did not file an appeal in his own name from the award of attorney's fees and costs.

(cont.)
collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Nearly a year later, in December 2003, Terry filed a motion asking the . district court to clarify that its order awarding fees and costs ran against Johnson as well as plaintiffs, and that Johnson was jointly and severally liable for the fees and costs. On January 14, 2004, the district court granted Terry's motion to clarify and amended its previous order to state that plaintiffs and Johnson are jointly and severally liable for t-h-a $12,055..50 awarded to Terry for fees and costs. Johnson did not appeal from this order.

1. Johnson's failure to appeal

Plaintiffs' notice of appeal from the order imposing attorney's fees and costs failed to name Johnson as a party. Johnson did not appeal from the district court's later order clarifying Johnson's responsibility for the fees and costs. We therefore lack jurisdiction to review the attorney fee and cost awards against Johnson. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1513 n.3 (10th Cir. 1995).

2. Plaintiffs' appeal

The district court awarded fees to Terry under its inherent power to sanction conduct that abuses the judicial process. While "the so-called `American Rule' prohibits fee shifting in most cases . . . a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or fir oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (quotation omitted). We review the district court's award of fees under this "bad faith
[-3-]

exception" for an abuse of discretion. *United States v. McCall,* 235 F.3d 1211,1216 (10th Cir. 2000). "The bad faith exception is drawn very narrowly and may

be resorted to only in exceptional cases and for dominating reasons of justice." Id. (quotation omitted).

The district court explained the reasons for its award of attorney's fees and costs to Terry as follows:

> Based on [their] representations [in the letter to Terry], plaintiffs obtained a default judgment against an unrepresented Mr. Terry. In effect, plaintiffs conspired with an unsuspecting Mr. Terry to obtain a judgment that, despite plaintiffs' suggestions, was completely personal and individual to Mr. Terry. At oral argument, plaintiffs' counsel . . . stated that plaintiffs' intent was to help Mr. Terry. Plaintiffs' actions did not help Mr. Terry in any way but led him to incur legal bills in excess of ten thousand dollars. Plaintiffs' scheme and treatment of Mr. Terry can only be described as bad faith, oppressive, and beyond the boundaries of appropriate litigation practices.

Aplt. App., No. 03-4041, at 99.

Plaintiffs advance the following argi:wents in opposition to the district court's findings: (1) they did not mislead the court in their arguments concerning the default judgment; (2) the letter to Terry was written by an associate of the Johnson firm who was later fired for writing letters without Johnson's knowledge; (3) they did not conspire with Terry to obtain a judgment; (4) they never counseled Terry to default in the case, and in fact sought a default judgment against him only when he failed to respond to their attempts to communicate with

him; and (5) their intention was to offer Terry a stipulated judgment that would protect him from any personal liability.

Upon review, having considered these arguments and reviewed the record in light of the applicable standards, we conclude that the district court did not abuse its discretion in awarding attorney's fees and costs to Terry. We therefore affirm the order of the district court awarding attorney's fees and costs.

Entered for the Court
Mary Beck Briscoe
Circuit Judge

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APPENDIX C - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, DATED AND DECIDED SEPTEMBER 23, 2002, in Van Tu v. Maj. Gen. Koster, et al., Case No.2:00-CV-807B.

FILED

IN THE UNITED STATES DISTRICT COURT
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DISTRICT OF UTAH - CENTRAL DIVISION

HOANG VAN TU, et al.,

Plaintiffs,

MEMORANDUM OPINION AND ORDER

VS.

Case No.: 2:00-CV-807B

MAJOR GENERAL KOSTER, et al.,

Defendants.

Before the Court is defendant Michael B. Terry's motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Specifically, defendant asserts that plaintiffs' complaint must be dismissed in its entirety because it is barred by the relevant statutes of limitation and there is not sufficient cause to justify a tolling of the pertinent time periods. Defendant asserts a variety of other arguments to support his position that plaintiffs' complaint must be dismissed. However, finding that the statute of limitation question disposes of the instant lawsuit, the Court will not fully explore defendant's further arguments.(1)

(1)Plaintiffs have filed a claim under 42 U.S.C. § 1983, alleging that their constitutional rights were violated by state actors acting under "color of state law." Irrespective of the statute of limitations question, plaintiffs' § 1983 claim fails because plaintiffs have sued defendant for alleged actions taken under color of *federal* law, not state law, and "[s]ection 1983 has no application

Accordingly, having considered the parties' briefs, oral arguments, and the relevant law, the Court issues the following Memorandum Opinion and Order.

BACKGROUND

A. Factual Background

On March 16, 1968, the United States Armv invaded the South Vietnam village of .My Lai and numerous soldiers allegedly raped and executed over five-hundred South Vietnamese civilians. The soldiers also set fire to the village, burning the civilians' homes to the ground. This incident is commonly known as the "My Lai Massacre." Plaintiffs are residents of the village of Son My, Quang Ngai Province, Vietnam, and are survivors of the incident.

In 1998, a Utah citizen saw a special newsreport explaining what allegedly occurred in My Lai on March 16, 1968. Believing that the survivors of the My Lai

(1)cont., to federal officers acting pursuant to federal law." *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976). Because causes of action under § 1983 only remedy state law violations, plaintiffs' § 1983 claim fails as a matter of law.

Plaintiffs also assert claims based on alleged violations of the United States Constitution in accordance with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotic*, 403 U.S. 388 (1971). *Bivens* claims exist only where alleged violations of federal Law or constitutional rights have occurred and to recover under such a cause of action, plaintiffs must be entitled to the protections of the violated federal law or constitutional right. In the instant case, plaintiffs are not entitled to such protections. It is undisputed that at the time of the My Lai Massacre, plaintiffs were South Vietnamese citizens. As such, plaintiffs enjoyed no protections of the United States Constitution and therefore the Court must dismiss all of plaintiffs' *Bivens* claims.

Massacre might have a cause of action under United States law, the Utah citizen hired an attorney, traveled to Vietnam to obtain consent from the villagers to prosecute the instant lawsuit, and found a Utah defendant, enabling plaintiffs to file the instant lawsuit before this Court. The Utah defendant, and movant herein, is Private Michael B. Terry.

Defendant Michael B. Terry was a fire team leader in the third platoon of Charlie Company on March 16, 1968, and as such, plaintiffs assert that defendant Terry assisted in implementing, directing and carrying out the United States Military Operation against the village of My Lai. Specifically, plaintiffs allege that defendant Terry "and those soldiers under his command were responsible for several mercy killings involving critically injured and untreatable civilians who were enduring extreme suffering from their terminal wounds." Plaintiffs assert that defendant acted under color of state law and with the authority of the United States of America.

On October 12, 2000 - more than 32 years after the alleged massacre occurred - plaintiffs filed the instant action arguing that defendant Terry, among others. "should be liable for money damages for . . . wrongful death, pain, and suffering, permanent disfigurement, battery, severe emotional distress, decreased enjoyment of life, loss of consortium, lost wages and earning capacity; past and future, and property damage." Plaintiffs further request "economic reparations," including "punitive damages to deter future atrocities;" damages for "wrongful death," and attorneys fees. Plaintiffs brought their claims under 42 U.S.C. § 1983 and the Alien Tort Statute, 28 U.S.C. 1350.

Defendant now moves the Court to dismiss plaintiffs' complaint in its entirety, arguing that plaintiffs' causes of action are time-barred by all relevant statutes of limitation.

B. Standard of Review

In ruling on defendant's motion to dismiss, the Court assumes the truth of all well-pleaded facts in plaintiffs' complaint and views them in the light most favorable to plaintiffs. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990); *Roman v. CessnaAircraft Co.*, 55 F.3d 542, 543 (10" Cir. 1995). The Court views all reasonable inferences in favor of plaintiffs, and the pleadings are liberally construed. See id. In reviewing the sufficiency of a complaint, the issue is not whether plaintiffs will prevail, but whether plaintiffs are entitled to offer evidence to support their claims. *See ,Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

DISCUSSION

Statutes of Limitation

Defendant argues that plaintiffs' case must be dismissed because it violates all applicable statutes of limitation time periods. Specifically, defendant argues that plaintiffs' claims under § 1983 and the Alien Tort Statute fail because they were filed long beyond the statutory cut-off periods. The Court will consider each cause of action in turn.

1. Plaintiffs'Section 1983 Claim

Plaintiffs first assert,that they are entitled to relief under 42 U.S.C. § 1983 because defendant, as an officer of the United States Army, acted under color of state law when, during an official military operation, civilians were allegedly raped and executed in the village of My Lai. Plaintiffs claim they are entitled to monetary damages for the pail and suffering they incurred as a result of this incident.

To support a valid § 1983 claim, the Court must find that plaintiffs' complaint was filed within the relevant statute of limitation time period for § 1983 claims. Both the United States Supreme Court and the Tenth Circuit Court of Appeals have found that the limitations period for claims brought pursuant to § 1983 is determined by borrowing the forum state's statute for

personal injury actions. *See Owens v. Okure, 488 U.S. 235 (1989); Industrial Construction Corp. v. United States Bureau of Reclamation, 15 F.3 d 963, 968 (10" Cir. 1994).*

The Tenth Circuit has also held that federal law determines when these claims accrue: "the statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." Industrial Construction Corp., at 968-69. In Utah, the limitations provision for personal injury claims is Utah Code Ann. § 7812-25(3), which requires the action to be filed within four years of accrual.

It is undisputed that plaintiffs knew they had suffered personal injuries at the time of the My Lai Massacre on March 16, 1968. Accordingly, to have timely filed their § 1983 claim in Utah federal district court, plaintiffs must have filed their complaint by March 16, 1972 - over 30 years ago. Thus, plaintiffs are clearly time-barred in tiling their § 1983 claim. Plaintiffs' § 1983 cause of action will'therefore only survive if the Court finds it justified to toll the statute of limitations time period, as discussed below.

2. Plaintiffs'Alien Tort Slatute Claim

Similarly, with respect to plaintiffs' Alien Tort Statute claim, the Court finds that plaintiffs' claim is time-barred by the relevant statute of limitation. The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2002). However, the statutory notes provide that "[nlo action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose." Id. Accordingly, to have timely tiled their complaint under the Alien Tort Statute, plaintiffs must have filed their complaint in the district court by March 1.6, 1978 - over 24 years ago. Plaintiffs have clearly failed to meet that time frame. Accordingly, unless the Court

finds that the statuteof limitation time period under the Alien Tort Statute is tolled for at least twenty-two years, plaintiffs' claim must fail.

B. Tolling of the Statutes of Limitations

Having found that the statutes of limitation time periods have run under both § 1983 and the Alien Tort Statute, the Court must now determine whether circumstances exist to justify tolling the relevant time periods, thereby allowing plaintiffs' claims to survive. The Tenth Circuit has held that plaintiffs have "the burden of establishing a factual basis for tolling statutes of limitation." *Aldrich v. McCulloch Properties, Inc.*, 637 F.2d 1036, 1041 n.4 (10'" Cir. 1980). In Utah; a statute of limitation can be tolled only when "exceptional circurnstances make it unjust or irrational to bar the cause of action." *Myers v. LV&Donald*, 635 P.2d 84 (Utah 1981).

In the instant case, plaintiffs list a variety of factors to support their claim that "exceptional circumstances" exist to justify tolling the relevant time periods. Specifically, plaintiffs argue that because they were under the rule of communism, plaintiffs could not travel to the United States to file a claim. Plaintiffs also contend that because they are poor, uneducated, and have had no opportunity to travel, it was impossible for them to bring a claim before now. Conversely, defendant argues that plaintiffs have had ample opportunities to find a way to file a claim through foreign visitors and radio or television communication. Defendant argues that plaintiffs had sufficient opportunity to bring a claim under either statute before the time period had run and to do so now - some 32 years after the underlying incident occurred - is not justified under the law.
[6]

Having considered the parties' arguments, the Court agrees with defendant and finds that there are insufficient reasons to permit equitable tolling of the relevant time periods for the number of years required to allow plaintiffs' claims to survive. Even if some equitable tolling period was justified due to plaintiffs' circumstances, the Court cannot justify toiling the two statutes of limitation for a period of more than 22 years. Statutes o f limitation serve an important purpose in our system of justice. Memories fade; evidence is lost, witnesses die, and the ability of the justice system to effectively search for the truth, redress grievances and cornpdnsate those harmed significantly diminishes as time passes. 'this is clearly the case in the instant lawsuit. Tow that over three decades have passed since the My Lai Massacre occurred, plaintiffs' claims are too stale and the reasons given for the untimely filing of the lawsuit are insufficient to survive defendant's motion to dismiss.

CONCLUSION

Having found that plaintiffs' complaint violates all applicable statutes of I imitation, and that there is no justification to toll the statutes under the circumstances of this case, the Court GRANTS defendant's motion to dismiss plaintiffs' complaint in its entirety. Plaintiffs' case is DISMISSED WITH PREJUDICE.

DATED this 20th Day of September, 2002.

Dee Benson
United States District
Judge

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